RECORD AND BRIEFS

No. 220141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave To File Bill Of Complaint

BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE COMPLAINT

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BRIEF OF HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1 AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION TO FILE COMPLAINT

INTEREST OF *AMICUS CURIAE* HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1[1]

The Hudspeth County Conservation and Reclamation District ("HCCRD"), a conservation and reclamation district of the State of Texas established under Article XVI, § 59, of the Texas Constitution, holds rights to Rio Grande Project Water. HCCRD provides that water to farmers within its jurisdiction in Hudspeth County, Texas, for irrigation use.

As a result of New Mexico's actions in violation of the Rio Grande Compact ("Compact") that are described and alleged in the State of Texas' Complaint and its Brief in Support of its Motion to File Complaint, HCCRD receives significantly less of the water to which it is entitled, and significantly less water than it would receive if not for such violations.

Accordingly, HCCRD has a significant interest in having the Court grant the Motion for Leave to File Complaint, so that the Court may address the dispute

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[1] This brief was not authored in whole or in part by counsel for any party, and no party, or parties' counsel, has made any monetary contribution intended to fund the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

presented, and so that New Mexico may be made to cease its violations of the Compact.

The purpose of this *amicus* brief is to explain the history and nature of HCCRD's interest in Rio Grande Project Water and how those interests are being affected by the diversions of water that are being allowed to occur by New Mexico in violation of the Compact.[2]

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[2] Under the rules of this Court, no motion for leave to file an *amicus curiae* brief is necessary if the brief is presented "on behalf of a city, county, town *or similar entity* when submitted by its authorized law officer." SUP. CT. R. 37.4 (emphasis added). As noted above, *amicus curiae* HCCRD is a conservation and reclamation district of the State of Texas, created under Article XVI, § 59 of the Texas Constitution. Such districts are "political subdivisions of the State, performing governmental functions, and standing upon the same footing as counties and other political subdivisions established by law." *Bennett v. Brown County Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); *see also Northwest Austin Mun. Utility Dist. No. 1 v. Holder*, 129 S. Ct. 2504, 2513-14 (2009); *El Paso County Water Improv. Dist. No. 1. v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *reformed in accordance with opin.*, 243 F.2d 927 (5th Cir. 1957); *Kirby Lake Development, Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829, 836 (Tex. 2010); *Willacy County Water Control & Improvement Dist. No. 1 v. Abendroth*, 177 S.W.2d 936, 937 (Tex. 1944). HCCRD is therefore covered under Rule 37.4. Moreover, because undersigned counsel is HCCRD's authorized law officer for the purpose of this case, no motion for leave (or consent) is necessary for HCCRD to file this *amicus curiae* brief. By letter from undersigned counsel, dated February 28, 2013, and sent by U.S. Mail and fax on that date, all counsel of record in this case received timely notice of HCCRD's intent to file this brief.

SUMMARY OF ARGUMENT

HCCRD is a political subdivision of the State of Texas located in Hudspeth County and responsible for providing water for irrigation to farmers within its jurisdiction. HCCRD receives water from the Project. It holds rights to divert water from the Rio Grande from within the Project based on a permit from the State of Texas, and has the right to receive Project Water based on its Warren Act Contract with the United States. These rights have been recognized in a judicial decree adjudicating the rights to water in the Upper Rio Grande in Texas. HCCRD's rights are being impaired by New Mexico's violations of the Compact.

HCCRD supports the Motion for Leave to File Complaint because the seriousness and dignity of Texas' claims warrants the exercise of the Court's original jurisdiction and because the State of Texas has no alternative forum to resolve the dispute presented.

ARGUMENT

I. HCCRD is a political subdivision of Texas containing 18,618 irrigable acres, authorized to enter into contracts with the United States, and required to distribute and apportion water acquired under such contracts.

The Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD") is a political subdivision

of the State of Texas, organized under Article XVI, Section 59 of the Texas Constitution, and subject to Chapter 55 of the Texas Water Code.[3]

HCCRD is authorized to enter into contracts or other obligations with the United States.[4] HCRRD is required by statute to "distribute and apportion all water acquired by [it] under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract."[5]

HCCRD includes 18,618 acres within its boundaries that are classified by the United States and HCCRD as irrigable. Hudspeth County is located immediately east and southeast of El Paso County and downstream (on the Rio Grande) from El Paso County and upstream from Fort Quitman.

II. The Rio Grande Project was established to resolve a dispute between the interests of Texas and New Mexico over the waters of the Rio Grande and provide for irrigation.

As described by State of Texas in its Brief in Support of Motion for Leave to File Complaint, the Twelfth National Irrigation Congress was held in El

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[3] TEX. WATER CODE ANN. §§ 55.001-55.805 (West 2002). Chapter 55 is the general statute governing water improvement districts in Texas. *See id.*, §§ 55.001(1); 55.021.

[4] *See id.* § 55.185.

[5] *Id.* § 55.364.

Paso in 1904 ("1904 Irrigation Congress") to resolve a dispute between the interests of Texas and New Mexico over the waters of the Rio Grande. The 1904 Irrigation Congress resulted in a recommendation for the construction, by the United States, of a federal dam and reservoir (that became the Elephant Butte Dam and Reservoir) to be operated by the United States Bureau of Reclamation ("Bureau of Reclamation").[6]

The 1904 Irrigation Congress' recommendations were implemented through the authorization of the Rio Grande Project.[7] In 1906, the United States contracted for the water developed by the Rio Grande Project with Elephant Butte Irrigation District ("EBID") in New Mexico and the El Paso County Water Improvement District No. 1 ("EPCWID") in Texas.

III. HCCRD entered into a Warren Act Contract for Rio Grande Project Water with the United States.

In 1911, Congress passed the Warren Act[8] to authorize the United States to contract for impounding, storing, and carriage of water, to cooperate in the

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[6] Brief in Support of Motion for Leave to File Complaint ("Brief in Support") at 6.

[7] Rio Grande Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814.

[8] 36 Stat. 925, 43 U.S.C. §§ 523-525 (2006).

construction and uses of reservoirs and canals under reclamation projects, and for other purposes.

In a letter to the Secretary of Interior written in November 1924, the Commissioner of the Bureau of Reclamation noted that:

> [HCCRD] contains an irrigable area of 20,014 acres located in the State of Texas just below the Rio Grande Federal irrigation project. The terminus of the Tornillo Main Canal of the Government project may be feasibly connected with the district canal to serve water to lands of the district. The United States will have available for disposal at the terminus of this canal certain water developed from the project, which water can be used for the irrigation of district lands. This water would be dumped into the river and lost to the project were it not utilized on lands in the Hudspeth District.[9]

The United States and the HCCRD entered into a Warren Act Contract, dated December 1, 1924, and amended in 1951 ("Warren Act Contract"), which provides for the use of Rio Grande Project Water by the HCCRD. The Warren Act Contract originally provided that "[t]he United States will deliver to [HCCRD] at the terminus of the Tornillo Main canal, during the irrigation season of 1925 and thereafter during each

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[9] *Hudspeth County Conservation and Reclamation District No. 1 v. Robbins*, 213 F.2d 425, 427 (5th Cir. 1954) ("*HCCRD v. Robbins*").

irrigation season as established on the Rio Grande project, such water from the project as may be available at said terminus without the use of storage from Elephant Butte reservoir."[10] The 1951 amendments to the Warren Act Contract added language specifying that the United States could deliver seepage or drainage water from land irrigated within the EPCWID, via canal, to HCCRD.[11]

IV. The Rio Grande Compact was negotiated and approved to protect the Rio Grande Project.

As described by the State of Texas, the Rio Grande Compact ("Compact") was necessitated and negotiated as a result of increased water development in Colorado and New Mexico upstream of Elephant Butte Reservoir. The Compact was approved in 1938. The Compact protects the Rio Grande Project, its operations, and the allocations of water to the Rio Grande Project beneficiaries.[12]

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[10] *HCCRD v. Robbins*, 213 F.2d at 427-428.

[11] *Id.* at 428. The right of the United States as storer and carrier of Project Water is not exhausted when such water is used once, but that right extends to the capture and reuse of such water. *See State of Nebraska v. State of Wyoming*, 325 U.S. 589 n.11 (1945).

[12] Brief in Support at 10-11.

V. HCCRD receives water from the Rio Grande Project.

The United States releases stored Rio Grande Project Water from the Elephant Butte and Caballo reservoirs to supply water in New Mexico and in Texas. The first two diversion dams downstream of Caballo Dam (Percha Diversion Dam and Leasburg Diversion Dam) are used by the United States to deliver water to EBID in New Mexico. Mesilla Diversion Dam is located in New Mexico but is used to divert water to both EBID in New Mexico and to EPCWID in Texas. American Diversion Dam is the next diversion dam downstream on the Rio Grande. The United States diverts water from the Rio Grande into the American Canal at the American Diversion Dam for EPCWID, some of which is subsequently used by HCCRD pursuant to the Warren Act Contract.

VI. HCCRD holds rights to divert water from the Rio Grande from within the Rio Grande Project.

HCCRD (and the United States) have the right to divert up to 27,000 acre-feet ("AF") per year of water from the Rio Grande in El Paso County and Hudspeth Counties to irrigate land within the boundaries of HCCRD. This right is set forth in Permit No. 236A

issued by the State of Texas via the Texas Commission on Environmental Quality.[13]

TCEQ has adjudicated all claims of water rights in the Upper Rio Grande (the portion of the Rio Grande in and bordering Texas above Fort Quitman, Texas). HCCRD's right to divert and use 27,000 AF per year from the Rio Grande is recognized in the final determination issued by TCEQ in that adjudication, dated April 13, 2006 ("2006 TCEQ Final Determination"). That determination was thereafter judicially adopted by Final Decree of the District Court for the 327th Judicial District, El Paso County, Texas, dated October 30, 2006 ("2006 Judicial Decree"). It was later recognized and set forth in the Certificate of Adjudication No. 23-5944 issued by TCEQ to HCCRD and the United States, dated March 7, 2007 ("2007 Certificate of Adjudication").

VII. HCCRD has the right to receive Rio Grande Project Water based on the Warren Act Contract.

HCCRD is also authorized by TCEQ to use up to 151,902 AF per year of any water delivered by the United States at the terminus of the Tornillo Drain, Hudspeth Feeder Canal, and Tornillo Canal under its Warren Act Contract with the United States. This

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[13] The Texas Commission on Environmental Quality ("TCEQ") is the Texas state agency charged with administering rights to surface water in Texas.

water consists of Rio Grande Project Water in excess of the needs of users within EPCWID, and drainage and return flows from Project Water delivered to EPCWID and used by EPCWID customers.

HCCRD's and the United States' rights under the Warren Contract to deliver and use, respectively, up to 151,902 AF per year of water from the Rio Grande Project are recognized in the 2006 TCEQ Final Determination, the 2006 Judicial Decree, and the 2007 Certificate of Adjudication.

These excess and drainage waters are Rio Grande Project Water. "The seepage waters, as well as the waters delivered to the [HCCRD] by [United States Bureau of] Reclamation officials under the contract executed in 1924, [are] all developed waters of the Rio Grande Project made possible by that project and never received by [HCCRD] prior to the construction by the [United States] of the dams, reservoirs and irrigation works."[14]

VIII. HCCRD may use the bed and banks of the Rio Grande to convey Project Water.

As expressly set forth in the 2007 Certificate of Adjudication, HCCRD and the United States are expressly authorized to use the bed and banks of the Rio Grande to transport Rio Grande Project Water to be used by HCCRD and to maintain diversion

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[14] *HCCRD v. Robbins*, 213 F.2d at 428.

structures and works in the Rio Grande as necessary to divert such waters.

IX. New Mexico violates the Compact by allowing the diversion and interception of water which deplete Rio Grande waters obligated to Texas.

As detailed by the State of Texas in its Complaint, New Mexico has violated and continues to violate the Compact by allowing the diversion of surface waters and the interception of subsurface water by pumping of waters hydrologically connected to the Rio Grande, and that such violations have depleted and continue to deplete Rio Grande waters obligated to the State of Texas and EPCWID.[15] New Mexico's violations of the Compact and the resulting depletion of waters obligated to the State of Texas and EPCWID, result in the depletion and significant reduction of waters available to HCCRD.

The diversion and interception of water in New Mexico in violation of the Compact have impaired, and continue to impair, the water supply of the Project and the water available downstream and to which Texas was assured under the Rio Grande Compact.

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[15] Complaint, ¶¶ 18-21.

X. Only this Court can resolve the Compact violations that the State of Texas has alleged; no alternative forum exists.

HCCRD agrees with the State of Texas and *Amicus Curiae* EPCWID that only this Court can resolve the Compact violations that Texas alleges in its Complaint and which relate to essential sovereign interests regarding water and the Compact obligations imposed on the States as sovereigns. The interstate nature of this dispute requires that all signatory states be brought before this Court, which alone has exclusive and original jurisdiction over such disputes.

No alternative forum exists with jurisdiction over the signatory states to the Compact and where complete relief can be afforded regarding Texas' claims.

XI. The State of Texas brings to the Court a significant, serious and dignified dispute.

HCCRD agrees with the State of Texas and *Amicus Curiae* EPCWID that Texas brings to this Court a significant, serious, and dignified dispute regarding New Mexico's violations and misinterpretations of the Compact.

CONCLUSION

This Court should grant Plaintiff's Motion for Leave to File Complaint. State of Texas' Complaint

asserts serious and dignified claims for which no alternative forum is available.

Respectfully submitted,

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